

STATE OF MICHIGAN
COURT OF APPEALS

HARPER HENDERSON,

Plaintiff-Appellee,

v

TRACI ANNE HENDERSON,

Defendant-Appellant.

UNPUBLISHED

June 9, 2011

No. 295765

Oakland Circuit Court

LC No. 07-735091-DM

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

TALBOT, J. (*concurring*).

While I concur in the result I am compelled to write separately to further explain why the trial court erred in failing to recognize that the appreciation in Harper Henderson's premarital interest in his family's publishing business was active and, therefore, subject to division in this divorce action.

Traci Anne Henderson asserts the trial court erred in failing to include, as part of the marital estate subject to distribution, the stipulated \$8.2 million appreciation in the business interest inherited by Harper Henderson. This Court has recognized:

In any divorce action, a trial court must divide marital property between the parties and, in doing so, it must first determine what property is marital and what property is separate. Generally, marital property is that which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage. Once a court has determined what property is marital, the whole of which constitutes the marital estate, only then may it apportion the marital estate between the parties in a manner that is equitable in light of all the circumstances. As a general principle, when the marital estate is divided "each party takes away from the marriage that party's own separate estate with no invasion by the other party."¹

¹ *Cunningham v Cunningham*, 289 Mich App 195, 200-201; 795 NW2d 826 (2010) (citations omitted).

The ability to invade separate property is governed by statute.² Specifically, an individual's separate estate may be invaded under two recognized circumstances:

(a) "[I]f the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case."³

or

(b) "The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property."⁴

While the wife asserts that an award under either statutory provision would be appropriate, herein I intend to address only the trial court's determination that entitlement to a share in the appreciation of the business interest is not available as it was solely the result of passive accumulation and/or the failure of the wife to actively contribute to the increase in value.

At the outset, I would observe that neither of the parties in this action particularly engenders our sympathy or compassion. To their good fortune, they have achieved an enviable lifestyle and financial security without having to endure years of struggle or effort. Regardless, it is necessary to address the circumstances as they exist and the parties do not dispute the significant appreciation of the husband's interest in the family business during the term of this relatively short marriage. Rather, they only dispute whether the appreciation of this asset during the term of the marriage is subject to invasion and division.

"[A] spouse's separate assets, or the appreciation in their value during the marriage, may be included in the marital estate."⁵ This Court has recognized that when an asset appreciates during a marriage due to the efforts of one spouse to put forth time and effort in the development or maintenance of the asset, which is facilitated by the other spouse's efforts in managing the

² MCL 552.401; MCL 552.23(1).

³ MCL 552.23(1).

⁴ MCL 552.401.

⁵ *Dart v Dart*, 460 Mich 573, 585 n 6; 597 NW2d 82 (1999), citing *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995).

marital home and providing child care, the amount of the asset's appreciation is to be included in the marital estate and, therefore, is subject to distribution.⁶ Any alternative outcome would be deemed inequitable simply because,

[t]he fruits of [husband's] efforts in the business were both the increase in the value of the business . . . and the salary he drew over the years. The parties were building an asset as well as enjoying its fruits on an ongoing basis. That [wife's] contribution to the asset came in the form of household and family services is irrelevant. The marriage was a partnership. . . . [T]he asset at issue did not increase in value simply by earning interest. Rather, it appreciated because of [husband's] efforts, facilitated by [wife's] activities at home.⁷

In the circumstances of this case, although downplayed by testimony that may be construed as self-serving, it is readily acknowledged that the husband was an active employee, in a high-ranking capacity, at the family business. While perhaps not the most dynamic or adept of the management staff, the husband's active involvement in the company was buttressed by his wife's maintenance of the marital home and oversight of the minor children. The fact that their lifestyle allowed them to afford domestic assistance in performing these tasks is irrelevant. It is also irrelevant that the husband, his siblings and father, inherited their interests in this company and that this benefit was not contingent on his employment with the business.

I believe the trial court lost sight of the fact that the focus of the issue is not the interest that the husband inherited in his family's business, but rather the very significant appreciation in value of that interest during the marriage. It is difficult to discern how the trial court could construe the husband's acknowledged involvement in the business through day-to-day employment in a management capacity as lending itself only to "passive appreciation" of the asset. Based simply on the definition of the term "passive" as meaning "[n]ot involving active participation; esp., of or relating to a business enterprise in which an investor does not have immediate control over the activity that produces income,"⁸ the husband's participation in the family business with wife's support in maintaining the home and children should have led the trial court to construe the appreciation in the business as a marital asset subject to distribution. Based on this outcome, it is unnecessary to address the wife's commensurate argument asserting the propriety of invading the husband's separate property based on need.

/s/ Michael J. Talbot

⁶ *Id.* at 293-294.

⁷ *Id.* at 294.

⁸ Black's Law Dictionary (9th ed).